COMMONWEALTH OF VIRGINIA

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STATE CORPORATION COMMISSION

June 14, 1999

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VIA FEDERAL EXPRESS

Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

RE: Petition of Global NAPs South, Inc., For preemption of jurisdiction of Virginia State Corporation Commission, CC Docket No. 99-198

Dear Ms. Salas:

Enclosed please find an original and seven (7) copies of the Virginia State Corporation Commission's comments for filing in the above-referenced matter. Please file stamp the additional eighth copy and return in the enclosed, self-addressed stamped envelope.

Very truly yours,

C. Meade Browder, Jr.

C. Meade Browder, Jr.
Attorney

CMB:nel
Enclosures

cc: Service List

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

PETITION OF GLOBAL NAPS SOUTH, INC.

For Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.

CC Docket No. 99-198

COMMENTS OF THE VIRGINIA STATE CORPORATION COMMISSION

The Virginia State Corporation Commission ("VSCC"), by counsel, files these comments in response to the petition of Global NAPs South, Inc. ("GNAPs") for preemption of the VSCC's jurisdiction regarding GNAPs' interconnection dispute with Bell Atlantic-Virginia, Inc. ("BA-VA"). Since the VSCC was not timely served with the petition by GNAPs,[1] the time by which interested parties were to file comments on the petition was extended from June 8, 1999 to June 15, 1999. (DA No. 99-1090.)

GNAPs claims that preemption is warranted because the VSCC failed to act on its petition for arbitration with BA-VA (VSCC Case No. PUC980173). This claim is totally unfounded. The VSCC did act, but apparently not in the manner desired by GNAPs. The VSCC acted in accordance with the requirements of § 252 of the Telecommunications Act of 1996. 47 U.S.C. § 252. The VSCC provided GNAPs ample opportunity to present its case through numerous pleadings and a hearing. GNAPs' real complaint is

[1] GNAPs' failure to comply with the service requirements of 47 CFR § 51.803(a)(2), requiring simultaneous service on the FCC and the state commission, may warrant dismissal of the petition. The VSCC will not seek such action, however.

that the VSCC did not find it necessary to reach every issue that GNAPs would have had the VSCC decide in the case.

In its petition for arbitration filed with the VSCC on November 16, 1998,[2] GNAPs "emphasize[d] that it seeks to have the scope of this arbitration remain limited and focused on the[] issues [discussed in the petition]." Arbitration Petition at 6. GNAPs' petition went on to define as the threshold issue before the VSCC whether it should be permitted to "opt in," pursuant to 47 U.S.C. § 252(i), to an interconnection agreement BA-VA had entered in 1996 with MFS Intelenet ("MFS Agreement"). GNAPs' arbitration petition and its reply to BA-VA's response[3] to the petition both identified only four specific issues in dispute[4] -- each of which arose out of certain conditions BA-VA sought to impose on GNAPs <u>should GNAPs opt into the MFS Agreement</u>. Arbitration Petition at 10-17; GNAPs Reply at 11-13. GNAPs concluded that, "[w]ith the exception of the issues set out [in the petition] GNAPs is aware of no other outstanding issues regarding interconnection." Arbitration Petition at 17.

GNAPs placed all of its arbitration eggs in the § 251(i) "opt in" basket at the VSCC.[5] GNAPs presented no evidence (and little argument) for the VSCC to set terms for an interconnection agreement with BA-VA in the event the VSCC determined it was not reasonable to require BA-VA to offer the soon-to-expire MFS Agreement to GNAPs.

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[2] GNAPs Arbitration Petition is attached as Exhibit 1.

[3] GNAPs Reply to BA-VA Response to the Arbitration Petition is attached as Exhibit 2.

[4] GNAPs labeled these four issues as: (1) Terminating Compensation Rates; (2) Calls to Internet Service Providers; (3) Ongoing Mirroring of Unrelated Future Changes; and (4) Deprivation of Equivalent Contract Term.

[5] BA-VA had argued that a § 251(i) opt-in dispute is not an arbitrable dispute under § 252(b). If BA-VA is correct, then there is no § 252(e)(5) preemption remedy available to GNAPs.

Indeed, prior to the March 25, 1999 (non-evidentiary) hearing,[6] GNAPs and BA-VA submitted a joint issues matrix to guide the VSCC in its resolution of the arbitration.[7] The first issue presents the threshold question of whether GNAPs can "opt in" to the MFS Agreement. The second and third issues present subsequent issues <u>should the first question be answered in the affirmative</u>. The fourth issue addressed possible deferral to the FCC (which both parties opposed), and the fifth issue dealt with the effect of the FCC's February 26, 1999 reciprocal compensation order. As demonstrated by the joint matrix, GNAPs failed to raise additional issues for VSCC resolution should the threshold "opt in" issue be answered in the negative.

Not until it filed a petition for reconsideration of the VSCC's April 2 Final Order on April 21, 1999 (leaving the VSCC only two days to consider the petition)[8] did GNAPs advance concrete arguments for alternative relief in lieu of opting into BA-VA's MFS Agreement.

In a March 11, 1999 procedural order, the VSCC invited GNAPs and BA-VA to address whether the VSCC should defer this arbitration to the FCC pursuant to 47 U.S.C. § 252(e)(5).[9] Having itself contemplated relinquishing jurisdiction to the FCC, the VSCC would thus not generally be distressed at the prospect of the FCC relieving the VSCC of further proceedings involving continuing interconnection disputes between GNAPs and

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[6] The hearing was to receive oral argument only. Both parties had agreed that there were only legal questions at issue and that an evidentiary hearing was unnecessary.

[7] This "BA-VA/Global NAPs Issues Matrix" is attached as Exhibit 3.

[8] Pursuant to its procedural rules, final orders remain under the control of the VSCC for only 21 days.

[9] The United States District Court for the Eastern District of Virginia has instructed that "the 1996 [Telecommunications] Act offers States a choice" and that the VSCC "may decline to administer the federal program." <u>GTE South, Inc. v. Morrison</u>, No. 3:97CV493, slip op. at 3 (E.D. Va. Nov. 7, 1997), <u>appeal docketed</u> (on other grounds), No. 98-1887 (4th Cir. June 18, 1998).

BA-VA. The VSCC did not, however, fail to act on the petition GNAPs brought before it in this instance, and preemption on the basis of such alleged failure would be improper.

Respectfully submitted,

VIRGINIA STATE CORPORATION COMMISSION

By: ______________________
Counsel

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June 14, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Comments of the Virginia State Corporation Commission was served by first-class mail, postage prepaid, this 14th day of June, 1999, to: Christopher W. Savage, Esquire, Cole, Raywid & Braverman, 1919 Pennsylvania Avenue, N.W., Suite 200 Washington, D.C. 20006; Warner F. Brundage, Jr., Esquire, Bell Atlantic-Virginia, Inc., 600 East Main Street, 11th Floor, Richmond, Virginia 23219; Janice M. Myles, Common Carrier Bureau, Federal Communications Commission, Room 5-C327, 445 12th Street, S.W., Washington, D.C. 20554; and International Transcription Services, Inc. 1231 20th Street, N.W. Washington, D.C. 20036.

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BEFORE THE

VIRGINIA STATE CORPORATION COMMISSION

Petition of **GLOBAL NAPs SOUTH, INC.**	)	
	)	
For Abitration of Interconnection Rates,	)	Case No. PUC98____________
Terms and Conditions and Related Relief	)	

**PETITION OF GLOBAL NAPs SOUTH, INC.
FOR ARBITRATION OF INTERCONNECTION RATES,
TERMS AND CONDITIONS AND RELATED RELIEF**

Global NAPs South, Inc. ("GNAPs"), by its undersigned attorneys, hereby petitions the Virginia State Corporation Commission (the "Commission") for arbitration of rates, terms and conditions for interconnection and related arrangements, concerning a proposed interconnection agreement between GNAPs and Bell Atlantic-Virginia, Inc. ("BA") pursuant to Sections 252(b) and 252(i) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 252(b), 252(i). GNAPs respectfully requests that while this arbitration is pending, BA promptly provide GNAPs with interconnection on an interim basis on terms consistent with those provided in other interim agreements provided by BA to other telecommunications companies in Virginia.

I. INTRODUCTION AND OVERVIEW OF FACTS; INTERIM RELIEF

A. Designated Contacts

All notices, correspondence, inquiries and orders regarding this Petition sent to GNAPs should be addressed to:

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The Principal contact person at Bell Atlantic known to GNAPs is:

John Messenger, Esquire
Bell Atlantic – Massachusetts, Inc.
185 Franklin Street, Room 1403
Boston, Massachusetts 02110

B. **Background**

1. GNAPs is a Virginia public service corporation. It is a wholly owned subsidiary of Global NAPs, Inc., a telecommunications corporation formed in 1996 under the laws of the State of Delaware. GNAPs' address is 10 Merrymount Road, Quincy, MA 02169.

2. GNAPs proposes to provide intrastate telecommunications services within the Commonwealth of Virginia. GNAPs is awaiting interconnection with BA and does not yet

provide services to Virginia customers. GNAPs, however, does have customers subscribed to take service from it when interconnection arrangements are finalized.

3. GNAPs is a small firm with several innovative approaches to the provision of telecommunications services in Virginia. In short, GNAPs is an example of the type of creative venture that the Act seeks to foster. Indeed, in promulgating its initial regulations under the Act, the Federal Communications Commission ("FCC") observed that:

> Competition [under the Act] is intended to pave the way for enhanced competition in ***all*** telecommunications markets, by allowing all providers to enter all markets. The opening of all markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increase innovation to American customers.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499 (1996) at ¶ 5 (emphasis in original).

4. BA is a monopoly provider of local exchange telecommunications and other services in large portions of the Commonwealth of Virginia.

5. For purposes of Sections 251 and 252 of the Act, BA is and has been at all material times an "incumbent local exchange carrier" ("ILEC") in Virginia under Section 251(h) of the Act.

6. On July 2, 1998, GNAPs requested interconnection, services and network elements from BA pursuant to Section 251 of the Act. This Petition is timely filed.[1]

7. As outlined below, GNAPs, as the requesting telecommunications carrier, has negotiated in good faith in accordance with Section 251(c)(1) of the Act to establish terms and conditions for a binding agreement with BA for interconnection, services and network elements. BA has not satisfied its duty to negotiate in good faith as required by Section 251(c)(1) of the Act.

8. The negotiations between GNAPs and BA, to date, have failed to yield a binding, executed interconnection agreement on all issues. Thus, BA has not entered into an agreement with GNAPs covering the terms and conditions of interconnection and unbundling under the 1996 Act notwithstanding the passage of essentially the entire negotiating period contemplated under Section 252(a)(1) of the Act.

9. In brief, on and since July 2, 1998, GNAPs has been negotiating an Interconnection Agreement under Sections 251 and 252 of the Act with BA. BA sent GNAPs its form agreement, which contains (among other difficulties) unreasonable limitations on the payment of reciprocal compensation for traffic handed off from one party to the other party within

[1] Pursuant to Section 252(b) of the Act, 47 U.S.C. §252(b), any party engaged in negotiations of an interconnection agreement may seek arbitration of any open issues during the period from the 135th to the 160th day after the date on which the incumbent local exchange carrier ("ILEC") received the request for negotiation. Bell Atlantic received a request from GNAPs to commence interconnection negotiations on July 2, 1998, pursuant to a Memorandum Agreement between GNAPs to Bell Atlantic dated that same date, attached hereto as Attachment A. Using July 2, 1998 as the formal interconnection request date, GNAPs has timely filed its Petition for Arbitration.

a BA local calling area for delivery to an Internet Service Provider, in direct contravention of this Commission's ruling in the *Cox* case (discussed below). GNAPs then requested an interconnection agreement that reflected all and only the terms included in BA's Interconnection Agreement with MFS Intelenet ("MFS"). BA provided a draft "MFS agreement" to GNAPs. This agreement related directly to New Jersey, but GNAPs understood BA to be taking the same position on the relevant issues in Virginia. The draft that BA supplied based on the MFS agreement is unacceptable for the reasons set forth below.

10. This Petition seeks to set forth all matters that remain open (*see* Section II below) and all interconnection matters agreed to (*see* Section III below).

11. As indicated above, the parties, to date, have been unable to reach a binding agreement on all issues through negotiations under Section 252(a)(1) of the Act. Section 252(b)(1) creates a specific arbitration process for ILECs and requesting telecommunication carriers, including competing local exchange carriers ("CLECs") to arrive at an interconnection agreement through "compulsory arbitration" by "petition [to] a State commission to arbitrate any open issues" unresolved by negotiation under Section 252(a). Either party to the interconnection negotiation may petition the State commission for arbitration during the relevant period.

B. <u>Interim Relief</u>

While the arbitration is pending, GNAPs respectfully requests that the Commission order BA to provide GNAPs with interconnection on an interim basis on terms consistent with those provided to other telecommunications companies in Virginia in interim agreements with such other carriers. Interim relief will enable GNAPs to provide services to Virginia customers as soon as possible consistent with the goal established in the Act of increasing competition.

C. <u>Arbitration Request</u>

In accordance with Section 252(b)(2) of the Act, and based upon its current understanding, GNAPs, the Petitioner, states below those issues that remain unresolved between the parties, and the position of each of the parties with respect to those issues. GNAPs reserves its right to arbitrate any issues which BA may assert are unresolved and to seek the inclusion in its agreement with BA of those provisions incorporated in the connection agreements of other requesting telecommunications carriers as expressly allowed under Section 252(i) of the Act. GNAPs also reserves its right to submit additional evidence in support of this petition as may be necessary or appropriate in light of the conduct of such arbitration.

II. UNRESOLVED ISSUES (Section 252(b)(2)(A)(i-ii))

A. <u>General</u>

GNAPs requests that the Commission arbitrate the issues discussed below which remain open between the parties. GNAPs would emphasize that it seeks to have the scope of this arbitration remain limited and focused on these issues. As noted above, GNAPs is a start-up venture, not currently serving customers in Virginia. As a start-up, GNAPs would like to avoid allocating its resources to protracted or broad arbitration proceedings when the issues in dispute are relatively narrow. Indeed, the burden of such a process on a start-up venture such as GNAPs could produce results contrary to the goals of the Act. GNAPs stands ready to abide by reasonable expenditure and timing limitations regarding this arbitration which may be established either with the consent of BA or pursuant to the Commission's order.

B. The Relationship Between Sections 251(c) And 252(i)

1. One of the key pro-competitive provisions of the Act is 47 U.S.C. Section 252(i). Under Section 252(i), a CLEC like GNAPs is not required to re-invent the wheel when it seeks to interconnect its facilities with an ILEC like BA. To the contrary, once an ILEC has entered into an interconnection agreement that has been approved by the relevant state commission (in this case, the SCC), any other CLEC may "opt in" to the terms of that agreement. Specifically, Section 252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved [by a state commission] under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Under the 8th Circuit's interpretation of this statute, "subsection 252(i) allows requesting carriers the option to select the terms and conditions of prior agreements only as a whole, not in a piecemeal fashion." *Iowa Utilities Board v. FCC,* 120 F.3d 753, 800 (8th Cir. 1997), *cert granted* 118 S. Ct. 879 (1998).

One of the key purposes of this "most favored nation" clause in the law is to prevent ILECs from discriminating among CLECs in the provision of interconnection arrangements. Section 252(i) of the Act, therefore, supplements the basic duty of nondiscrimination imposed directly on ILECs in Sections 252(c)(2) and 252(c)(3) of the Act, 47 U.S.C. §§ 251(c)(2), 251(c)(3) (which require ILECs to be "nondiscriminatory" in the provision of interconnection arrangements and access to unbundled network elements, respectively).

2. Section 252(i) and the non-discrimination provisions of Section 251(c) work in tandem to guide and constrain the negotiating leverage of an ILEC monopolist such as BA. Section 251(c) of the Act speaks in terms of the ILEC's "duties" to a "requesting telecommunications carrier" such as GNAPs, including the duty to be non-discriminatory in matters of interconnection arrangements. Section 252(i) gives a "requesting telecommunications carrier" an absolute right to obtain such arrangements on the same terms and conditions contained in any agreement that has been approved by this Commission under the terms of Section 252(e). In negotiating terms, this means that all previously-approved interconnection agreements are, as a matter of law, "on the table" in any negotiation between the ILEC and any "requesting telecommunications carrier." This helps level the playing field as between the incumbent monopolist (on whom CLECs are quite dependent in order to operate at all) and the CLEC, because at any time the CLEC knows that it can simply "opt in" to whatever the best available already-approved agreement might be.

3. The Commission's own resources are also conserved by recognizing this intimate connection between Section 252(i) and Section 251(c) of the Act. Because all previously approved agreements are "on the table" as a matter of law, CLECs will be encouraged to focus their negotiations with ILECs only on issues that are new or in some way unique to the particular

CLEC. As a result, over time the only cases that should come to arbitration are those in which some new circumstances issue or new issue has arisen — not covered in an agreement previously approved by the Commission — as to which the ILEC and the CLEC cannot agree. Over time, therefore, arbitrations should become both less frequent and, when they occur, more focused on novel issues that truly call for Commission intervention.

4. This entire statutory arrangement breaks down if the ILEC attempts to interfere with or condition the right of a requesting telecommunications carrier to "opt in" to an existing agreement. If ILECs are permitted to impose extraneous conditions on the ability of CLECs, as part of their overall negotiating strategy, to rely on their Section 252(i) rights, then even issues that the Commission and the industry had properly viewed as settled can be re-opened for debate and litigation. As described below, this is what has occurred here.

5. In conformity with the 8th Circuit ruling, GNAPs has sought, as part of its negotiation strategy with BA, to "opt in" to the terms of BA's approved interconnection agreement with MFS. That three-year agreement contains the essential interconnection terms that GNAPs needs to begin operations in Virginia. It also contains provisions that ensure that GNAPs may, during its term, request additional interconnection arrangements not directly addressed by the MFS agreement itself. Considered as a whole, therefore — while not perfect — the MFS agreement appeared to provide a reasonable basis upon which Global NAPs could enter the Virginia market. BA, however seeks to impose discriminatory conditions on GNAPs, to which MFS is not subject, in direct violation of Sections 252(i), 251(c)(2), and 251(c)(3) as set forth

below. GNAPs' position is that such discrimination is illegal under those statutory provisions, and that BA should be required to give GNAPs the same deal that BA gave MFS.

C. <u>Specific Issues In Dispute</u>

There are four specific conditions that BA seeks to impose on GNAPs' ability to "opt in" to the MFS agreement:

1. **Terminating Compensation Rates.** One of the key elements of any interconnection agreement is the rate that a carrier is entitled to receive when it terminates calls that originate on the network of the other carrier. *See* 47 U.S.C. § 251(b)(5) (establishing compensation obligation). The logic of terminating compensation is that the originating carrier bills its customer (the calling party) for making calls, but — when the called party is served by another carrier — does not incur the full cost of carrying the call to its destination. Instead, the carrier serving the called party incurs call termination costs as to which (under the "calling party pays" rule normally applicable to local exchange service) the only source of revenue is the charges by the ***originating*** carrier to ***its*** customers.

As a matter of negotiating strategy, if the business plan of either an ILEC or CLEC suggests that it will be a net "originator" of traffic, it will want the call termination rate to be as low as possible (since, on balance, it will pay the other carrier to terminate calls that its end users originate). If the carrier's business plan suggests that it will be a net "terminator" of traffic, however, it will want the call termination rate to be as high as possible (since, on balance, it will be called upon to complete calls originated by the other carrier's customers, for which it will receive no other revenue).

Under these circumstances, it is clear that the call termination rate is a material term of the contract. BA, however, will not agree to the same call termination rate for GNAPs that it agreed to with MFS. Instead, BA wants the unilateral right to substitute rates established in the Commission's ongoing generic arbitration proceedings for the negotiated rate contained in the MFS agreement. This position, however, ignores the strong preference in the Act for negotiated, not arbitrated, results. BA agreed that the rates contained in the MFS agreement were acceptable to BA, in light of all the other terms and conditions contained in that agreement. As agreed-to terms and conditions, these rates were evaluated by the Commission under the standard of Section 252(e)(2)(A) of the Act. Arbitrated rates, however, are subject to a totally different statutory standard, *i.e.* the requirements of Section 252(d)(2) of the Act. There is no reason to think that the rates that arise from applying the Section 252(d)(2) standard (the project on which the Commission is currently embarked) would be the same as the range of rates that are permissible under the standard of Section 252(e)(2)(A). BA's position, however, would read the separate standard of Section 252(e)(2)(A) of the Act out of the law.

2. **Calls To Internet Service Providers.** This Commission has specifically held that calls to ISPs are local calls like any other for purposes of reciprocal compensation under the Act. The issue came before the Commission in a dispute between BA and the telecommunications affiliate of Cox Communications ("Cox"). BA declared that it would not pay terminating compensation on calls to ISPs served by Cox, even though nothing in the parties'

interconnection agreement called for any special treatment of those calls. When Cox sued, the Commission rejected BA's arguments:

> Calls that are placed to a local ISP are dialed by using the traditional local-service, seven-digit dialing sequence. Local service provides the termination of such calls at the ISP, and any transmission beyond that point presents a new consideration of service(s) involved. The presence of CLECs does not alter the nature of this traffic.

Petition of Cox Virginia Telecom, Inc., for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers, Final Order, Case No. PUC970069 (Va. SCC Oct. 24, 1997), slip op. at 2.

This conclusion, of course, is consistent with the FCC's longstanding rule that information services provides (including Internet Service Providers, or "ISPs") are permitted to connect to a local exchange carrier's network on the same terms and conditions as any other business end user. As the FCC stated in its *Access Charge Reform Order* in May 1997:

> As a result of the decisions the Commission made [in 1983], ISPs may purchase services from incumbent LECs under the same ***intrastate tariffs available to end users.*** ISPs may pay ***business line rates*** and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.

Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, *First Report and Order,* 12 FCC Rcd 15982 (1997) at ¶ 342 (emphasis added). This FCC policy was challenged by, among others, BA, but was affirmed by the 8th Circuit in *Southwestern Bell v. FCC*:

> [T]he Commission has appropriately exercised its discretion to ***require*** an ISP to pay ***intrastate charges for its line*** and to pay the [Subscriber Line Charge] (which has been increased in the Order to cover a greater proportion of interstate allocated loop costs), but not to pay the per-minute interstate access charge.

Southwestern Bell v. FCC, 153 F.3d 523, 541-42 (8th Cir. 1998) (emphasis added). In this same ruling, the 8th Circuit noted that calls to ISPs are indeed "local" in nature, stating:

> ISPs subscribe to LEC facilities in order to ***receive local calls*** from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed.

Southwestern Bell, 153 F.2d at 542 n.9 (emphasis added). As the court's note recognizes, ISPs are a class of business customer that tends to receive large volumes of calls. As a result, if a CLEC is successful in competing with the ILEC (and other CLECs) for the business of an ISP, one consequence will be the receipt of call termination fees from the ILEC.

BA objects to the FCC's long-standing policy regarding ISPs, objects to this Commission's ruling, and objects to the business strategy of CLECs who seek to serve the communications needs of ISPs. BA, therefore, has sought to impose on GNAPs a requirement — nowhere present in the MFS agreement — that calls that BA's customers make to ISPs will be exempted from BA's obligation to pay call termination fees.

This is plainly discriminatory. The MFS agreement contains no such limitation on BA's call termination fee obligations. The Commission has ruled that the Cox agreement which, like the MFS agreement, contains no specific exception for calls to ISPs, includes such calls within its definition of "local" traffic. There is no lawful reason to subject GNAPs to a different regime.[2]

3. **Ongoing "Mirroring" Of Unrelated Future Changes.** GNAPs has reviewed several of the "agreements approved" by the Virginia regulators and concluded that the MFS agreement would suit its needs. BA, however, will not permit GNAPs to enter into a binding contract that reflects the terms of the MFS Agreement. Instead, BA is demanding that GNAPs agree, sight unseen, to accept any changes in the MFS agreement that BA might subsequently negotiate ***with MFS***, independent of GNAPs.

BA apparently believes that an "opted into" agreement under Section 252(i) of the Act is somehow merely an appendage of the original agreement that provides the terms and

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[2] In another jurisdiction (New Jersey), BA has claimed that a recent FCC ruling regarding the proper jurisdictional analysis of dedicated digital subscriber line connections between customers and ISPs affects this long-standing FCC policy regarding dial-up connections to ISPs. In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, *Memorandum Opinion and Order*, CC Docket No. 98-79 (released October 30, 1998) ("*GTE ADSL Ruling*"). Any such claim is plainly baseless, however, because the FCC itself expressly stated that no such impact was intended:

> We ***emphasize*** that we decide here ***only*** the issue designated in our investigation of GTE's federal tariff for ADSL service, which provides specifically for a ***dedicated*** connection, rather than a circuit-switched, dial-up connection to ISPs and potentially other locations. ... This Order ***does not consider or address*** issues regarding whether [LECs] are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs. ... [W]e find that this Order ***does not, and cannot, determine whether reciprocal compensation is owed,*** on either a retrospective or a prospective basis, pursuant to existing interconnection agreements, ***state arbitration decisions,*** and federal court decisions.

GTE ADSL Order at ¶ 2 (emphasis added). In light of these FCC statements, GNAPs believes that it constitutes bad faith negotiation in violation of Section 251(c)(1) for BA to assert that this FCC ruling affects the proper legal and jurisdictional analysis of switched, dial-up calls to ISPs.

conditions being opted in to. The analysis, however, ignores the plain meaning of Section 252(i). GNAPs is entitled to the same terms and conditions that ***this Commission*** approved for MFS. MFS is not subject to having its contract with BA revised as a result of dealings by unrelated third parties, and GNAPs should not be subjected to such a condition either. Moreover, as noted above, there is an intimate relationship between the provisions of Section 252(i) and BA's non-discrimination obligations in the various subsections of Section 251(c). GNAPs has proposed to BA ***as part of the negotiations*** that GNAPs receive the same terms and conditions as BA provided to MFS, as required by Section 252(i) of the Act. BA's rejection of this proposal on any basis is highly questionable; but in the specific context of the "mirroring" suggestion, BA is attempting to ignore the fact that GNAPs has independent status as a "requesting telecommunications carrier" under ***both*** Section 251(c) (all relevant subsections) ***and*** Section 252(i).

In short, while MFS and BA are free to renegotiate any way they see fit, GNAPs is entitled to interconnect with BA on the terms and conditions contained in the agreement approved by this Commission. If MFS and BA subsequently negotiate a modification to that agreement which is later approved by the regulators, then Section 252(i) gives GNAPs the option to "opt in" to that subsequent, modified agreement as well. It does not, however, require GNAPs to do so.

4. **Deprivation Of Equivalent Contract Term.** BA will not give GNAPs the same three-year contract term that it gave MFS (*i.e.*, a contract that will remain in effect for a period of approximately three years from the date of execution to the date of expiration). Instead, BA insists that its agreement with GNAPs be ***co-terminous*** with the MFS agreement (*i.e.*, a

contract that will expire in a matter of months, co-terminous with the expiration of the MFS agreement). Numerous specific provisions of the MFS agreement, however, plainly contemplate that the agreement will extend for a period of several years from the date of execution, and, indeed, critical benefits of the agreement are simply not obtainable if "new" versions of the agreement terminate on the same calendar date (July 1, 1999) as the MFS Agreement.

BA's position is a clear misreading of Section 252(i) of the Act, even as interpreted by the 8th Circuit Court of Appeals. In a capital-intensive business like telecommunications, it is critical that market participants have reasonable certainty of the terms under which they will operate in order to justify the substantial capital expenditures required to operate at all. The term of an interconnection contract, therefore, is clearly a material aspect of "the terms and conditions of" an existing agreement, considered "as a whole." *See Iowa Utilities Board supra* at 800. BA's position would deprive firms such as GNAPs, seeking to take advantage of the entirety of an agreement, from one of the key benefits of a multi-year contract: the very stability and predictability that the original contractor negotiated for in establishing a multi-year term.

This BA condition (aside from violating Section 252(i)) is also discriminatory in violation of Sections 251(c)(2) and 251(c)(3) of the Act. MFS, under its agreement, gets the benefit of a stable three-year contract. GNAPs, by contrast, would get the "benefit" of a contract that expires in less than a year.

BA has claimed that if the MFS agreement is not interpreted as terminating on a certain date, BA will be forever subject to the same agreement as one CLEC after another "opts in" to the original agreement. This claim is wrong. The reason that the MFS agreement is available for "opting in" to in the first place is that this Commission has affirmatively found that it is consistent with the public interest and does not discriminate against any carrier, under the terms of Section 252(e)(2)(A) of the Act. As long as that ruling remains in effect, there is no reason to forbid other CLECs from opting in to the agreement's terms.

This also shows why BA would not be subject to the terms of the MFS agreement forever. If circumstances have changed in some material way so that the terms of the MFS agreement are no longer in the public interest, BA is free to present those changed circumstances to the Commission and to seek a ruling to that effect. Assuming that BA could so persuade the Commission, it would no longer be possible for any CLEC to "opt in" to that agreement.

III. OTHER ISSUES DISCUSSED AND RESOLVED BY THE PARTIES (Section 252(b)(2)(A)(iii))

With the exception of the issues set out above, GNAPs is aware of no other outstanding issues regarding interconnection.

IV. RELIEF REQUESTED

For all the foregoing reasons, GNAPs respectfully requests:

1. That the Commission arbitrate the unresolved interconnection issues between GNAPs and BA described in Section II above, and that such arbitration be conducted on

an expedited basis with reasonable limitations on procedures (e.g., discovery), timing, hearing dates and arbitration expenses to be incurred by the parties;

2. That in rendering its decision regarding such arbitration, the Commission accept the positions of GNAPs reflected in Section II;

3. That the Commission direct BA to articulate clearly an interconnection offering to GNAPs and compel BA pursuant to Section 252(b)(4)(B) of the Act to provide to GNAPs any and all relevant information regarding the unresolved interconnection issues;

4. That, in order to effectuate the competition sought under the Act, the Commission direct BA to enter into an interconnection agreement with GNAPs immediately upon the conclusion of such arbitration and that, while such arbitration is pending, the Commission direct BA promptly to provide GNAPs with interconnection on an interim basis on terms consistent with those provided to other competitive local exchange carriers in Virginia; and

5. That the Commission accord GNAPs such other relief as it deems it necessary or appropriate.

Respectfully submitted by,
GLOBAL NAPs SOUTH, INC.

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Of Counsel

Date: November 16, 1998

Attachment A

Memorandum Agreement July 2, 1998

The parties agree to execute interconnection agreements and grooming process documents consistent with the terms of this memorandum agreement and the appended revised form interconnection agreement for the states of New York, Rhode Island, Maine, New Hampshire and Vermont with only such modifications as are necessary to comply with the law and standard operational procedures of each state:

1. The terms regarding reciprocal compensation shall be modified to reflect the following: there will be a blended rate of .8 cents per minute in each of the states. If Bell Atlantic exercises its virtual end office option under section 5.7.2.1, or in the case of New York, Bell Atlantic exercises its option to demand efficient interconnection, Global NAPs may demand that the parties pay reciprocal compensation to each other based upon Bell Atlantic's standard reciprocal compensation terms. The grooming plan shall reflect that Bell Atlantic shall not exercise either option unless an average of 21 DS-1s are being utilized to carry the traffic in question.

2. Sections 6 incorporates language proposed by Bell Atlantic. Global NAPs agrees to negotiate with Bell Atlantic in good faith regarding application of this language and incorporate the product into the interconnection agreement. Bell Atlantic will consider adopting the Massachusetts language for section 21.

3. Section 7.4.7 shall be replaced with the following: "If either party suspects a discrepancy in the jurisdictional nature of the traffic delivered over the frame relay trunks, the matter will be dealt with as a billing dispute under section 29.8. Both parties will cooperate developing factual information to resolve the dispute."

4. Term: the term for the New York agreement shall be until December 31, 2000. The term for the other agreements shall be a date certain 36 months from the date of execution. All of the agreements will be executed within six months of July 1, 1998.

5. The grooming process shall reflect that the Parties agree that connection in each case shall be by SONET ring with a mid span meet. The SONET rings shall be constructed as follows: Bell Atlantic will build the electronics on its side, Global NAPs will build or have built the electronics on its side, the meet point shall be a fiber patch panel within Global NAPs premises. Bell Atlantic will install the fiber and own the fiber. Global NAPs will make a onetime payment to Bell Atlantic constituting half of the cost of installing the fiber. In the case of New York, Global NAPs will not make a payment towards the fiber. Global NAPs shall undertake reasonable efforts to locate its IP so as to minimize the costs to each party of provisioning fiber between the Bell Atlantic IP and the Global NAPs IP.

6. Section 10.4.2 of the interconnection agreement will incorporate Bell Atlantic's proposed language. Global NAPs proposed language for that section will be incorporated into the grooming process.

7. We agree to follow following process for executing interconnection agreements. Bell Atlantic will prepare draft interconnection agreements and memorialize portions of the grooming process based upon this memorandum agreement. The parties will negotiate regarding the southern Bell Atlantic states using the Bell Atlantic southern state form agreement as a template but looking for guidance to the material for terms agreed-upon for the northern states.

8. The parties agree to take all necessary actions to suspend proceedings on the pending petitions for arbitration and upon execution of an interconnection agreement for each state Global NAPs will formally withdraw its petition.

William Rooney
Global NAPs, Inc.

John Messenger
Bell Atlantic

BEFORE THE

VIRGINIA STATE CORPORATION COMMISSION

PETITION OF	)	
	)	
GLOBAL NAPs SOUTH, INC.	)	
	)	Case No. PUC980173
For arbitration of unresolved issues	)	
from interconnection negotiations with	)	
Bell Atlantic-Virginia, Inc. pursuant to	)	
§ 252 of the Telecommunications Act of 1996	)	

REPLY OF GLOBAL NAPS SOUTH, INC.

Global NAPs South, Inc. ("GNAPs") respectfully files this Reply to the Response of Bell Atlantic - Virginia, Inc. to Arbitration Petition ("Bell Atlantic Response"). Sections 1, 2 and 3 of this Reply address general issues that permeate this arbitration, including both the Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief ("Petition") and the response of Bell Atlantic - Virginia, Inc. ("Bell Atlantic"). Section 4 then provides a point-by-point response to Bell Atlantic.

1. GNAPs Wants To Compete, Not To "Game" The System.

GNAPs wants to compete with Bell Atlantic in a number of markets for both intrastate and interstate telecommunications services. As a new entrant, GNAPs will naturally look for market niches in which Bell Atlantic is vulnerable to competitive attack. Providing Internet Service Providers ("ISPs") with necessary dial-in connections to the public switched network is one such niche.

Bell Atlantic does not want to face such competition. Its special antipathy for GNAPs appears to arise from the fact that under applicable rulings of this Commission and the Federal Communications Commission ("FCC"), once GNAPs starts serving ISPs, Bell Atlantic will have to share some of its lucrative second line and local calling plan revenues with GNAPs. *See* cases cited in Petition, Section II.C.2.

Contrary to Bell Atlantic's innuendoes, *see* Bell Atlantic Response at 1-7, Bell Atlantic will have to make these payments not due to some "loophole" in the rules, nor due to some effort by GNAPs to "game" the system. Bell Atlantic will have to make these payments because GNAPs will earn them. GNAPs has made a multi-million dollar investment in switches and related facilities and equipment in Virginia. That equipment — which cost real money to obtain and which costs real money to operate and maintain — will perform real work in connecting calls made by Bell Atlantic's end user customers to ISPs served by GNAPs.[1] It is nothing more than pettifoggery for Bell Atlantic to suggest that GNAPs is not entitled to compensation for the switching and related functions it will perform for its ISP customers.

Moreover, as ISPs disconnect from Bell Atlantic's network in order to receive service from GNAPs, Bell Atlantic will enjoy significant cost savings. Its switches will have fewer lines connected to them, and will experience significantly lower traffic loads. This will save short-run operating costs, and (ultimately more significant) allow for the deferral (or total avoidance) of expensive switch replacement or augmentation projects.

Bell Atlantic would probably prefer a system in which payments were not required when CLECs serve ISPs. ILECs have long held the view that dial-in calls to ISPs are "really" a form of interstate access and that, therefore, the ISPs should pay per-minute rates for their incoming connections to the public switched network. Under this (hypothetical) system, an ISP served by a CLEC would pay some amount of "access charge" that would (presumably) be split between the CLEC and Bell, akin to arrangements for jointly providing access to interexchange carriers originating or terminating long distance calls.

It is, of course, conceivable that such a regime might someday be established — although it would involve complete reversal of fifteen years of FCC precedent, repeatedly affirmed by the courts. But today the rule is quite clear: ISPs are entitled to purchase intrastate local exchange

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[1] GNAPs' equipment will be used for other services as well. Bell Atlantic's objections, however, seem to arise from the fact that GNAPs will initially focus on providing service to ISPs, so this discussion focuses on that situation as well.

business lines on the same terms as any other end users, in order to receive local calls from their customers.[2] This means that the ***only*** money available to compensate a CLEC for switching incoming calls to ISPs is money that the ILEC collects from its end users who call the ISPs in the first place.

It follows that if ILECs are not required to compensate CLECs for calls to ISPs, then CLECs will not be able to afford to serve ISPs at all. While charges to the ISP for local exchange service would cover the cost of connecting the ISP to the CLEC's switch, the costs involved in terminating incoming calls to the ISP would not be recoverable at all. Consequently, the result of adopting Bell Atlantic's position on the merits will be a market in which ISPs seeking to compete with each other and with Bell Atlantic's own ISP affiliate will have no choice but to use Bell Atlantic for their connections to the public switched network. It is inconceivable that the pro-competitive policies of the Telecommunications Act of 1996 would be served by a ruling that deprives ISPs of any effective

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[2] *See* materials cited in Petition, Section II.C.2. It is no answer to these cases to point out (as Bell Atlantic does) that they arose in the context of access charges. What the FCC has said — and what the courts have affirmed — is that ISPs are entitled to purchase intrastate business local exchange services in order to receive calls from their customers. That is the service that Bell Atlantic now sells to ISPs, and that is the service that GNAPs wants to sell to ISPs. It may be that in some underlying sense what the ISP is "really" obtaining is a form of interstate switched access. But if it is, then Bell Atlantic should respect what the FCC has said about the service — which is that, whatever it really "is," ISPs can obtain it by purchasing service on the same terms and conditions as any other business end user customer. And, in any case, the FCC has affirmed that ISPs are to be treated as customers, not carriers, in the context of non-discrimination rights under Section 202 of the federal Communications Act; in the context of interconnection rights under Section 251(c) of the Act; and in the context of universal service obligations under Section 254 of the Act. *See* In the Matter of *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, *Further Notice of Proposed Rulemaking,* 13 FCC Rcd 6040 at ¶ 33 (including ISPs among the category of "end users" entitled to non-discriminatory treatment under Section 202); In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499 (1986) at ¶ 995 (ISPs as such are end users, not carriers, and so do not have interconnection rights as "requesting telecommunications carriers"); In the Matter of Federal-State Joint Board on Universal Service, *Report and Order,* CC Docket No. 96-45 (released May 8, 1997) at ¶¶ 788-90 (there is a distinction between the telecommunications functions that carriers provide to link end users to ISPs, which ***are*** "telecommunications" subject to universal service assessments, and the information services that ISPs provide, which are ***not*** "telecommunications" and not subject to universal service assessments). *See also* In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress,* 13 FCC Rcd 11501 (1998) at ¶¶ 13, 105 (ISPs are customers of carriers, not themselves carriers).

competitive alternatives in the marketplace, and that deprives CLECs of any effective opportunity to compete for the business of ISPs.

This basic economic analysis is not particularly affected by whether dial-up connections to ISPs are viewed as interstate, intrastate, one call, two calls, many calls, or some complex jurisdictional hybrid. Obviously if dial-up calls from end users to ISPs actually "are" intrastate in nature, then this Commission has full authority to decide the question of reciprocal compensation obligations with regard to them. But even if dial-in connections to ISPs are "really" a form of interstate access service that are "really" involved in establishing an end-to-end telecommunications path between the end user and a distant web site, this Commission ***still*** has full authority to decide the question of reciprocal compensation with regard to them, at least until the FCC takes some further action. This is because the FCC — the regulator with jurisdiction, under Bell Atlantic's theory — has specifically stated that ISPs are permitted to purchase local exchange service out of intrastate tariffs, in order to receive local calls. And the FCC's decision in this regard has been specifically upheld by the federal courts, against a specific challenge to it by Bell Atlantic.[3]

In these circumstances, if anyone is trying to game the system, it is Bell Atlantic. Today — and at all times material to this negotiation and arbitration — the rule has clearly been that calls to ISPs are to be treated as jurisdictionally intrastate and local.[4] This means that the service of providing ISPs with connections to the public switched network is (or is to be treated as) a form of telephone exchange service, and that terminating compensation is due when an ISP served by a CLEC receives calls from end users served by an ILEC. Bell Atlantic is hoping that this rule will change sometime soon, and in the meantime is adopting the classic monopolist's stance of delay and refusal to deal. GNAPs hopes that this Commission will bring a swift end to Bell Atlantic's intransigence.

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[3] *See* cases cited in Petition, Section II.C.2.

[4] *Se id.*

2. **GNAPs Wants The Same Terms And Conditions That MFS Received, Not Different Terms And Conditions.**

Bell Atlantic and GNAPs have a straightforward disagreement about the MFS Agreement to which GNAPs wants to opt in. From GNAPs' perspective, what MFS negotiated for and obtained was a contract with a term of approximately three years in length. The three-year contract provided MFS with a certain degree of stability and certainty as it made its network deployment and interconnection decisions.

The contract simply does not make substantive sense — it is essentially incapable of performance — unless it is construed as having a multi-year term running from the date a particular CLEC enters into it, as opposed to having a fixed termination date. Analytically, the underlying question is what it means for a CLEC such as GNAPs to obtain the "same" agreement that MFS got. In this regard, GNAPs notes that in an industry with large investment requirements and long planning and implementation periods, when negotiations began in July 1998, a "three year agreement" is a materially different thing than an agreement that ends on July 1, 1999.[5]

Bell Atlantic claims that if the MFS Agreement is interpreted as a three-year agreement, it will be forever subject to that agreement's terms as one CLEC after another "opts in" for another three-year term. This claim, however, is a red herring.

First, the existing agreement has been approved by the this Commission under Section 252(e)(2)(A) as both non-discriminatory and consistent with the public interest. As long as that finding remains "good law," it would make no sense to conclude that the agreement could not be opted into.

Second — and most directly germane to Bell Atlantic's concern — such a finding need

[5] GNAPs does not contest that if provisions within an approved agreement have been modified by operation of law, a CLEC opting in to the agreement is bound by the subsequent legally mandated changes. GNAPs does, however, disagree with Bell Atlantic's claims that any FCC actions that have occurred to date affect the provisions of the MFS agreement calling for compensation for local calls, including local calls made to ISPs.

not remain "good law" forever, irrespective of changing circumstances for the ILEC or the industry generally. To the contrary, just as this Commission has the authority to prospectively revise interconnection and unbundled element prices established under Section 252(e)(2)(B) and Section 252(d) in light of changed circumstances (there, changed costs), this Commission also has the authority to conclude (on an appropriate record) that changed circumstances mean that an agreement that once met the standard of Section 252(e)(2)(A) no longer does so. All Bell Atlantic needs to do to prevent "chaining," therefore, is to persuade the Commission that circumstances have changed enough that further iterations of the agreement would, indeed, fail the test of Section 252(e)(2)(A).

It follows that the supposed problem of chaining is illusory. Chaining is available only with regard to agreements that have been affirmatively approved by this Commission. If changed circumstances warrant a termination of the availability of a particular agreement for opting in, the Commission can make such a finding, ending the chaining "problem." But if circumstances have not changed in any material way, then there is no reason to prevent additional CLECs from opting in to the agreement at all.

3. Efforts By ILECs To Frustrate CLECs' Section 252(i) Rights Are A Proper Subject For Arbitration Under Section 252(b).

Bell Atlantic asserts that its failure (or, from its perspective, its ***alleged*** failure) to compiy with the requirements of Section 252(i) is not an appropriate subject for arbitration. *See* Bell Atlantic Response, paragraph I.B.6. This is absurd.

A request by a CLEC to opt in to a particular, pre-existing agreement is nothing more or less than a request to obtain interconnection, unbundled elements, etc., on a particular set of terms — those contained in the agreement to which the CLEC wants to opt in. The function of Section 252(i) is to pretermit senseless and repetitive "negotiation" of an agreement that has already been approved by the Commission and that is acceptable to the affected CLEC. To permit such re-negotiation would serve only to delay the entry of CLECs into the market — precisely the opposite of what the 1996 Act envisions, yet precisely the result that Bell Atlantic is achieving in this case.

Any doubt that Section 252(i) is relevant to good faith negotiations under Section 251(c) (and, therefore, subject to arbitration under Section 252(b)) is removed by the language of Section 251(c) itself. Sections 251(c)(1), (c)(2), and (c)(3) (relating to good faith negotiations, interconnection arrangements, and unbundled elements, respectively) all require that the ILEC act in accordance with "Section 252" generally. Section 252(i) is part of Section 252. It follows that the requirements of Section 252(i) are incorporated into the negotiating process envisioned by Section 251(c)(1) and Section 252(a). It also follows that failure by an ILEC to allow a CLEC to operate under the same terms and conditions as contained in an already-approved agreement constitutes an arbitratable dispute.

Here, as described above, the parties have a dispute about what the MFS agreement actually means — principally, but not exclusively, in the area of the term of the agreement. That dispute arose in the course of negotiations initiated under Section 252(a). For that reason as well, the question of what Bell Atlantic must do to comply with Section 252(i) constitutes, in this case, an arbitratable issue under Section 252(b).

4. Responses To Specific Bell Atlantic Statements Made In Response To The Petition.

The following material follows the organizational structure of the Petition and the Bell Atlantic Response.

I.B. Background

1-2. No further response needed.

3. Bell Atlantic "denies that the FCC ruling referred to in the third sentence accurately repeats the FCC's language or that the cited language comes from ¶ 5 of the FCC order referred to in this paragraph." First, GNAPs admits that the language it quoted did not come from ¶ 5 of the cited FCC order, as GNAPs originally stated. The quoted language comes from the very end of ¶ 4 of the cited

FCC order. GNAPs regrets this typographical error. As to the accuracy of GNAPs' repetition of the language, GNAPs provides a more extended quote from ¶ 4 below:

> Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications — the local exchange and exchange access markets — to competition is intended to pave the way for enhanced competition in ***all*** telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499 (1996) at ¶ 4 (emphasis in original). GNAPs believes that its competitive entry strategy is only possible by virtue of the fact that all telecommunications markets are now open to competition, so that it is entitled to compete with Bell Atlantic on equal terms for the business of ISPs, whether the services that ISPs buy are characterized as intrastate or interstate, local exchange or exchange access, or something else.

4. Bell Atlantic denies that it is a monopolist, citing the number of certificated local exchange carriers within its formerly exclusive territory. GNAPs submits that the proper measure of Bell Atlantic's monopoly status is not the number of competitors authorized to do business, but instead the various competitors' impact on the market, including their respective market shares. GNAPs also notes that the FCC has characterized the local exchange and exchange access markets that GNAPs seeks to enter as "one of the last ***monopoly bottleneck*** strongholds in telecommunications." *See above*.

5. No further response needed.

6. Bell Atlantic claims that "the arbitration provision in the Act, Section 252(b), does not apply to an MFN request" under Section 252(i). Bell Atlantic is wrong. *See* Section 3 of this Reply.

7. Bell Atlantic generally denies GNAPs' statements that GNAPs has negotiated in good faith and that Bell Atlantic has not. GNAPs knows that it has negotiated in good faith and believes that Bell Atlantic has not.

8. No further response needed.

9. No further response needed, except that GNAPs notes that its Petition (Paragraph II.C.2), as well as Section 1 of this Reply, demonstrate that reciprocal compensation is indeed due when one LEC's customers call an ISP served by another LEC.

10. No further response needed.

11. No further response needed.

B (sic) Interim Relief

No further response needed.

C. Arbitration Request.

Bell Atlantic's response to this unnumbered paragraph constitutes statements of its legal position to which no further response is needed.

II. Unresolved Issues.

A. General

No further response needed.

B. The Relationship Between Sections 251(c) and 252(i).

1. The Bell Atlantic Response constitutes a statement of its legal position to which no further response is needed. In further reply, GNAPs notes that it does not claim a right to opt in to an agreement "upon different terms and conditions than those provided in the agreement." GNAPs claims that by providing MFS with a three-year agreement but only offering GNAPs an agreement with a term of substantially less than a year, Bell Atlantic has tried to force GNAPs to accept a materially different agreement than the agreement that Bell Atlantic entered into with MFS.

2. *See* paragraph B.1 immediately above. With regard to Bell Atlantic's implicit assertion that some aspects of the MFS agreement "conflict with currently applicable law," GNAPs notes that the MFS agreement contains provisions that call for the parties to the agreement to renegotiate any terms that have been affected by such changes in law. The existence of changes in law, therefore, cannot provide a basis upon which Bell Atlantic may reasonably and in good faith refuse to enter into the MFS agreement with GNAPs. At most, such changes in law would produce an obligation on the parties to negotiate replacement language if, indeed, any such language is called for.

3-4. No further response is needed.

5. GNAPs denies that it "has not been willing to enter into an agreement containing the same terms as the MFS agreement." GNAPs *seeks* the same terms as MFS received, including a three-year term permitting stable investment and network planning decisions. GNAPs specifically denies that the FCC has ever ruled that a dial-up connection from an end user to an ISP "does not involve a local call." In the *GTE ADSL Order*, the FCC stated that for jurisdictional purposes a dedicated, always-on connection between an end user and an ISP involving only one LEC serving both the end user and the ISP should be viewed as establishing an end-to-end transmission of communications from the end user to the web sites accessed by the end user. In that same order the FCC specifically stated that the presence of multiple LECs and dial-up as opposed to always-on connections would materially affect the analysis, making the *GTE ADSL Order* inapplicable to the question of terminating compensation

for dial-up calls.[6]

C. Specific Issues In Dispute.

1. Terminating Compensation Rates.

GNAPs states that Bell Atlantic has no basis upon which it can make statements regarding GNAPs' "intentions." GNAPs specifically denies that its intention is to provide "incoming private line connections to ISPs." ISPs receive dial-in calls from end users that must be switched to be directed to the appropriate ISP and to the appropriate line for any particular ISP.[7] As a result, the connections between GNAPs' switch and an ISP are properly viewed as (switched) local exchange lines, not (unswitched) "private lines."

GNAPs specifically denies that by providing connections to ISPs through which ISPs may receive dial-up calls, GNAPs is not "providing local dial tone service to any customers." GNAPs specifically asserts that ISPs ***are*** customers and that the FCC rulings and court decisions discussed above show that as a matter of law, those customers are purchasing local exchange service. Pursuant to those rulings, ISPs are Bell Atlantic customers when (today) they purchase ISDN PRI and similar local loop services from Bell Atlantic, and they will be customers of GNAPs (or other CLECs) in the future when they disconnect their Bell Atlantic service and obtain service from a CLEC instead.

GNAPs specifically denies that "the FCC has ruled" that "Internet calls are not local calls," and specifically asserts that GNAPs is indeed entitled to reciprocal compensation with respect to such calls.

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[6] GNAPs noted in the Petition (paragraph II.C.2, footnote 1) that the FCC had specifically stated that the *GTE ADSL Order* did not apply to dial-up calls to ISPs involving two LECs. Nothing in Bell Atlantic's response even attempts to explain why, in light of these FCC statements, it is nonetheless appropriate to rely on the *GTE ADSL Order* in this case — as Bell Atlantic does. *See* Bell Atlantic Response, page 2.

[7] An ISP will use different numbers to direct calls to particular types of modems that can offer service at different data rates, such as 28.8 kbps, 56 kbps, ISDN rates, etc.

As to Bell Atlantic's statements regarding the MFS agreement, *see* response to paragraph II.B.5 above.

As to Bell Atlantic's characterization of "Internet calls" and its compensation obligations with regard to them, *see* response to paragraph II.B.5 above; Section 1 of this Reply; and Section II.C.2 of the Petition.

2. Calls To Internet Service Providers.

Bell Atlantic's response to this section of the Petition constitutes legal argument to which no further response is needed. *See* response to paragraph II.B.5 above; Section 1 of this Reply; and Section II.C.2 of the Petition.

3. Ongoing Mirroring Of Unrelated Future Changes.

GNAPs accepts Bell Atlantic's statement that it would not expect GNAPs to abide by changes to the MFS agreement subsequently negotiated between Bell Atlantic and MFS. GNAPs agrees that if supervening law mandates a change in the term of an interconnection agreement following its approval by the Commission, a party opting in to that agreement is bound by the same supervening law as applies to the original parties. GNAPs specifically denies that the FCC has issued any orders that have the effect of holding "that Internet calls are not local calls." GNAPs asserts that the FCC in the *GTE ADSL Order* specifically stated that the analysis in that order could not and should not be applied to the dial-up context. *See also* response to paragraph II.B.5 above; Section 1 of this Reply; and Section II.C.2 of the Petition.

4. Deprivation of Equivalent Contract Term.

GNAPs specifically denies that it is seeking a "change" in the MFS agreement. GNAPs asserts that the only changes it seeks to make to the MFS agreement are "ministerial" in nature, *i.e.*, those changes needed to create a contract between Bell Atlantic and GNAPs, as opposed to a contract between Bell Atlantic and MFS, but that otherwise contains the same terms as the MFS agreement. Among those ministerial changes are adjustments to ***both*** the "effective date" of the agreement and the "termination date" of the agreement. To change only the effective date, but not the termination date (as Bell Atlantic proposes) would create an agreement between Bell Atlantic and GNAPs that is substantively and materially different from the agreement between Bell Atlantic and MFS.

Bell Atlantic's arguments about the supposed dangers of "chaining" a single agreement into perpetuity are a red herring. *See* Section 2 of this pleading.

GNAPs also specifically denies that it is "unwilling to live up to other provisions in" the MFS agreement. Assuming *arguendo* that the MFS agreement contemplates that MFS will serve customers that originate traffic to Bell Atlantic customers, as well as vice versa, nothing in the MFS agreement requires MFS to obtain such customers at any particular point over its three-year term. Certainly nothing in that agreement prevents MFS (or GNAPs) from focusing its initial marketing efforts on customers who receive large volumes of incoming calls.

5. Conclusion.

Bell Atlantic wants to avoid competing with GNAPs. Bell Atlantic knows that GNAPs will likely obtain the business of a number of ISPs who currently pay Bell Atlantic for a variety of high-margin, sophisticated services and who contribute substantially (albeit indirectly) to Bell Atlantic's bottom line by (among other things) stimulating the purchase of second lines by Bell Atlantic's end users. And once GNAPs is providing terminating switching services to route calls to those ISP customers, Bell Atlantic suspects, if it does not actually know, that it will be required to share its revenue with GNAPs, in the form of terminating compensation payments.

In classic monopolistic fashion, therefore, Bell Atlantic is simply stonewalling — refusing to allow GNAPs to interconnect even under already-approved terms and conditions — in order to delay GNAPs' entry into the market. At bottom, that is what this particular arbitration is about. And, for that very reason, the Commission should move promptly to resolve this dispute and direct Bell Atlantic to enter into an interconnection agreement with GNAPs that parallels the MFS agreement.

For the foregoing reasons, GNAPs respectfully requests that it be afforded the relief requested in its Petition, and for such further relief as may be appropriate.

Respectfully submitted by,
GLOBAL NAPs SOUTH, INC.

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BA-VA/GLOBAL NAPs ISSUES MATRIX		
ISSUE	**BA-VA POSITION**	**GLOBAL NAPS POSITION**
1. Can Global NAPs "opt in" to the 1996 MFS Agree-ment under § 252(i)?	No. Under 47 C.F.R. § 51.809(c), a "reasonable time" for the 1996 MFS agreement has passed. Moreover, under 47 C.F.R. § 51.809(b), the cost of providing interconnection to Global NAPs exceeds that contemplated by the 1996 MFS agreement. Global NAPs should negotiate its own agreement or "opt in" to a more recent one.	Yes. Global NAPs tried to opt in starting in August 1998, so the "whole contract" rule applies. But if Rule 809 applies, the "reasonable time" rule protects ILECs against significant cost or technical changes, neither of which has occurred; and the increased cost referred to in Rule 51.809(b) is increased unit cost, which has also not occurred.
2. If Global NAPs can "opt-in" to the 1996 MFS Agreement, will reciprocal compensation be due for Internet traffic?	Any issue of prospective contract interpretation is not properly before the Commission in this case and should not be considered.	The Commission need not decide this issue, but the parties disagree, so the Commission may do so. If the issue is addressed, then compensation for Internet traffic is due, both under the *Cox* precedent and as a matter of proper policy.
3. If Global NAPs can "opt-in" to the 1996 MFS Agreement, when will the agreement with Global NAPs expire?	Any issue of prospective contract interpretation is not properly before the Commission in this case and should not be considered. Furthermore, any contract adopted under Section 252(i) would expire at the same time as the original contract, like every other "MFN" contract Bell Atlantic has signed.	The Commission need not decide this issue now, but if it does not do so, the parties will likely return in a matter of months. The substantive terms of the MFS agreement show that a three-year term is a material element of the bargain. So, Global NAPs should also have a three-year term.
4. Should the Commission defer to the FCC under Section 252(e)(5)?	No. This case is an MFN case that the Commission can decide quickly and does not depend on resolution of Internet compensation issues similar to those under consideration by the FCC.	No. This case can be decided as an MFN case. Moreover, all of the disputed issues are matters which this Commission has the authority to decide under Section 252 and applicable FCC rulings.
5. What effect does the FCC's February 26 Internet traffic order have on this case?	The Internet traffic order has no direct impact on this case because any issue of any prospective contract interpretation between Global NAPs and BA-VA is not properly before the Commission. Neither the Act nor BA-VA's contracts provide for reciprocal compensation for Internet traffic.	The Internet traffic order has no direct impact on this case because that order by its terms leaves existing Commission rulings regarding Internet traffic, such as the *Cox* case, unchanged, and any Commission review of *Cox* should take place in a separate, industry-wide proceeding.